TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 384

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

SALLY L. BILDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1961
CERTIORARI GRANTED NOVEMBER 13, 1961

Supreme Court of the United States

OCTOBER TERM, 1961

No. 384

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SALLY L. BILDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13293

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT M. AND SALLY L. BILDER, RESPONDENTS

On Petition for Review of the Decision of the Tax Court of the United States

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APPENDIX TO PETITIONER'S BRIEF

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[fol. 1]

TAX COURT OF THE UNITED STATES

Docket No. 71548

ROBERT M. BILDER AND SALLY L. BILDER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET ENTRIES

Date (Month, day, year)	Filings and proceedings	Action	Served
Jan. 13, 1958	Petition filed: Fee paid Jan. 13, 1958		Jan. 14, 1958
Jan. 13, 1958	Request by petitioner for trial at Newark, New Jersey.	Granted Feb. 5, 1958	Feb. 6, 1958
Mar. 13, 1958	Answer by respondent filed		Mar. 14, 1958
Mar. 19, 1959	Notice of trial June 15, 1959, N.Y.C.		
May 26, 1959	Appearance of Martin D. Cohen, Esq.		
June 10, 1959	Motion by petitioner for continuance of trial now set June 15, 1959, be continued generally.	Denied June 15, 1959	
June 10, 1959	Application by petitioner for order to takes depositions of Dr. Jerome G. Kaufman, Dr. Paul, Boyer, Dr. Irving S. Wright, Dr. William Goldring, Dr. Philip Shulman.	Denied June 15, 1959	June 24, 1959

Date (Month, day, year)	Filings and proceedings	Action	Served
June 10, 1959	Notice of hearing June 15, 1959, at New York, on petitioner's motion for continuance and Application for order to take depositions.		June 11, 1959
June 15-16, 1959	Trial at New York by J. Withey:		
	Petitioner application for order to take depositions.	Denied June 15, 1959	June 15, 1959
	Petitioner motion for continuance	Denied June 15, 1959	June 15, 1959
	Respondent motion to file am. answer.	Granted am. answer filed.	June 15, 1959
	Stip. of facts filed.		
	Original briefs due Aug. 17, 1959; replies due Sept. 16, 1959.		
	Under submission—J. Withey		
June 24, 1959	Reply to amended answer filed by petitioner.		
July 20, 1959	Transcript of proceedings filed (2)		
Aug. 11, 1959	Motion by respondent for extension of time to Aug. 31, 1959, to file Brief.	Granted Aug. 12, 1959	Aug. 13, 1959
Aug. 31, 1959	Original brief filed by petitioner		Sept. 1, 1959
Aug. 31, 1959	Original brief filed by respondent		Sept. 1, 1959
Sept. 8, 1959	Supplemental stipulation filed		
Sept. 8, 1959	Joint motion to correct transcript	Granted Sept. 9, 1959	Sept. 10, 1959
Sept. 30, 1959	Motion by petitioner for extension of time to Oct. 14, 1959, to file reply brief.	Granted Oct. 2, 1959	Oct. 5, 1959
Sept. 30, 1959	Reply brief filed by respondent		Oct. 13, 1959
Oct. 12, 1959	Reply brief filed by petitioner		Oct. 13, 1959
Oct. 26, 1959	Findings of fact and opinion filed. Judge Withey. Decision under Rule 50.		Oct. 26, 1959
Oct. 30, 1959	Motion by petitioner for modification of Court's headnote findings of fact and opinion and (alternatively) for leave to submit additional evidence.	Denied Nov. 2, 1959	Nov. 4, 1959
Nov. 5, 1959	Supplemental motion by petitioner to give consideration to attached affidavit.	Denied Nov. 6, 1959	Nov. 10, 1959
Dec. 7, 1959	Agreed computation filed		
Dec. 29, 1959	Decision entered. Judge Withey		Dec. 30, 1959
	Appellate proceedings		
Mar. 28, 1960	Petition for review by U.S.C.A. 3d Circuit filed by respondent.		
Mar. 28, 1960	Notice of filing mailed to counsel filed		
Mar. 31, 1960	Proof of service of petition for review on petitioners' counsel filed.		
Apr. 1, 1960	Petition for review by U.S.C.A. 3d Circuit filed by petitioners.		Apr. 1, 1960
Apr. 1, 1960	Proof of service of petition for review filed.		
Apr. 29, 1960	Motion for extension of time for filing record on review and docketing petition for review to June 25, 1960 (on respondent's petition for review) filed by respondent.		May 2, 1960
May 2, 1960	Order extending time for filing record on review and docketing petitioners' and respondent's petitions for review to June 25, 1960.		May 2, 1960

[fol. 3] BEFORE THE
TAX COURT OF THE UNITED STATES

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FINDINGS OF FACT AND OPINION—Oct. 26, 1959

WITHEY, *Judge:* For the years 1954 and 1955 the Commissioner determined deficiencies in the income tax reported by petitioners in the respective amounts of $450 and $281.90. By amended answer, respondent claims increased deficiencies in the respective amounts of $75.76 and $84.90. The issues for decision are (1) whether rental paid for a Florida apartment is a deductible medical expense and (2) whether transportation expense to Florida is a proper medical expense deduction.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioners are husband and wife who reside in Mountainside, New Jersey, and filed their joint income tax returns for 1954 and 1955 with the district director of internal revenue at Newark, New Jersey. Hereinafter, unless otherwise indicated, petitioner has reference to the husband, Robert M. Bilder.

Petitioner was born March 14, 1911. He is a member of a Newark law firm. Since the age of 35 he has suffered four heart attacks each resulting in a myocardial infarction. That term means that muscular tissue of the heart has become necrotic due to a lack of sufficient blood circulation. The failure of blood to circulate through petitioner's heart muscle tissue was in each instance the result of a coronary occlusion. That term means a closing or narrowing of an artery feeding blood to the heart [fol. 4] tissue to such an extent that insufficient or no blood may pass to such tissue to nourish it. In petitioner's case, as is true generally, upon the occurrence of each such event other blood vessels already in existence and newly developed vessels gradually took over the burden of providing the blood supply for that portion of his heart muscle which remained alive and still functioning after each attack. Accepted as proper treatment by emi-

nent heart specialists, at least in the United States, is the advice to such patients as petitioner that, if they live in a cold climate, they are to remain indoors or hospitalized during the winter months or, in the alternative, spend the winter months in a warm climate. The latter alternative advice was given petitioner by one of the most eminent heart specialists in the United States if not the world. This advice was given him because of his personality characteristics. He is and was at the time the advice was given a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or in a hospital in the relatively cold climate of New Jersey throughout the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was for petitioner in order that new vascular passages for blood to the heart may more readily and quickly develop.

Subsequent to such advice, petitioner, his wife, and child traveled from their home in New Jersey to Fort Lauderdale, Florida, in December of 1953. From Janu- [fol. 5] ary 1, 1954, to March 24, 1954, they lived there in a rented apartment paying a total rent for the period of $1,500. Petitioner chose Fort Lauderdale and the apartment for the following reasons:

The specific disease from which petitioner suffers is atherosclerosis. The objective of the medical treatment accorded him was therefore the prevention of the clotting of his blood and the prescribing of Dicumerol, an anticoagulant drug, to that end. The objective of the advice given him as part of the treatment of his disease, concerning his conduct of his way of life, was that he should live under such conditions that he could obtain the proper exercise to the end that he might develop sufficient coronary blood vessel capacity to properly nourish what remains of his heart muscle tissue. The primary objective of all his treatment and the advice given inci-

dental thereto was the prevention of any further myocardial infarction with resulting impairment or destruction of the functioning of his heart, thus prolonging his life. Fort Lauderdale climate accords with this advice. Dicumerol, in 1953, was not widely used in the treatment of heart disease and relatively few doctors were competent to use it for that purpose. Because the drug prevents the natural tendency of human blood to clot, its use is attended by grave danger of hemorrhage unless doctors and hospitals competent to control the dosage and measure the level of the drug in the blood of the patient are readily available. One of the few doctors in Florida then competent to supervise petitioner's use of the drug was in Fort Lauderdale. Petitioner's apartment was in close proximity to one of the few hospitals then able to test petitioner's blood to determine the correct dosage of Dicumerol. Petitioner has resided in Fort [fol. 6] Lauderdale during the winter months each year since 1953 and has been under the care of the same doctor during those months of each year. The doctor examines petitioner at least weekly and upon occasion oftener when required in order to maintain the proper percentage of Dicumerol in his blood.

On December 15, 1954, petitioner and his family again returned to Fort Lauderdale and until February 10, 1955, lived in the same apartment at a rental for the period of $829. On the latter date petitioner and his family moved to a house he had purchased in that city. On April 15, 1955, they returned to Newark where petitioner resumed his law practice.

While in Florida during 1954 and 1955 petitioner taught school at a salary of $50 per week. During such periods, by agreement with other members of his Newark law firm, although he continued to share in its profits, petitioner forfeited a $150 weekly drawing account therefrom. The move to Florida each winter for such an extended period with its attendant disruption of petitioner's Newark household and the necessity that their daughter be taken from one school and placed in another constituted a burden upon the family. Their sojourns in Fort Lauderdale during the years at issue were not vacations; they were taken as a medical necessity and as a primary part of

necessary medical treatment of a disease from which petitioner was and still is suffering.

It is stipulated and found that the cost of petitioner's individual transportation from Fort Lauderdale to Newark and from Newark to Fort Lauderdale during 1954 was $250 and that the same cost was incurred by him during 1955 for like trips. On his income tax returns for the years at issue he deducted as "medical care" expenses both the rentals paid for the Florida apartment and $250 [fol. 7] each year for transportation between Newark and Fort Lauderdale. Respondent has disallowed such deductions.

The necessary expenses of $500 and $277 for 1954 and 1955, respectively, for the individual housing of the petitioner in Fort Lauderdale and the transpotration expense of $250 of petitioner between Fort Lauderdale and Newark for each of the years at issue were incurred or paid by him for the mitigation and treatment of myocardial infarction, for the prevention of further such heart damage as a result of atherosclerosis from which he suffered during those years, and for the purpose of maintaining the proper functions of his heart and constitute expenses incurred by petitioner for medical care and treatment.

Opinion

If deductible, the deductions here involved are allowable under section 213 of the Internal Revenue Code of 1954, applicable portions of which are in the margin.[1]

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[1] SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(a) Allowance of Deduction.—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152)—

* * * *

(e) Definition.—For purposes of this section—

(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

With the exception of its reference to the deductibility of transportation expense, the section is virtually identical with and expresses the same congressional intent as did [fol. 8] section 23(x) of the Internal Revenue Code of 1939. *Frank S. Delp*, 30 T.C. 1230.

Respondent in effect argues that we wrongly decided the *Delp* case, because the congressional history, he contends, requires an opposite conclusion. In view of the clarity of the wording of section 213 of the 1954 Code, we see no reason to resort to congressional history for its meaning. We see no reason therefore to change the position we took with respect to its meaning as expressed in that case.

We have found as fact the factors which must control our ultimate decision of this case. The general criteria to be considered in resolution of this issue under section 23(x) of the 1939 Code were set forth in *Edward A. Havey*, 12 T.C. 409, and *L. Keever Stringham*, 12 T.C. 580, affd. 183 F. 2d 579 (C.A. 6, 1950). They are as follows: (1) What was the purpose of the taxpayer in making the expenditures sought to be taken as a medical expense deduction? (2) Would the expenditure have been made but for the advice of a physician? (3) Did the expenditure have direct relationship to the treatment of a specific disease? (4) Was the treatment reasonably designed to effect the diagnosis, cure, mitigation, or prevention of a specific disease or to affect any structure or function of the body? Because Congress has left virtually unchanged in section 213 of the 1954 Code the language it used in section 23(x) of the 1939 Code and because the last two cited cases long predate enactment of the 1954 Code, we use the same criteria for our decision here.

This record clearly supports a conclusion that the primary and only purpose for the housing and transportation expenses of petitioner here involved which were incurred by him was that he might so conduct his life, after four heart attacks with their resulting myocardial infare- [fol. 9] tion, that he could develop sufficient additional blood vessel capacity to properly nourish and keep functioning such remaining heart muscle tissue as he still possessed while at the same time he might be so located

as to have available proper medical supervision and hospital facilities that he might continue to maintain a safe blood level of the anti-coagulant drug Dicumerol. The drug was taken because it tended to prevent the clotting of the blood passing through and into his heart. Its use was necessary because the specific disease from which petitioner suffered (atherosclerosis) causes a narrowing of the arteries leading to the heart, thus making it difficult or impossible for a blood clot to pass through them.

Would these expenditures have been made but for the advice of a physician? We think not. Petitioner's repeated heart attacks with their convalescent periods seriously impaired his ability to earn a living at the law. During the period of their occurrence he was (against certain medical advice) attempting to reestablish an active law practice in Newark after several years' absence while serving in the Armed Forces of the United States. He had a wife and school-age daughter who were living with him in Newark in a dwelling owned by them. Removing the daughter from school and enrolling her in another twice each year was to say the least undesirable. The disruption of their household for a period of about 4 months each year was distasteful to petitioner's wife. He was under the continuous care of a physician while in Florida and for the years at issue worked at teaching while there. His choice of State, city, and dwelling therein was we think dictated entirely by the advice of eminent medical authority. We have therefore found as a fact that his [fol. 10] sojourns in Florida during the years involved were not vacations. It reasonably follows that his housing and transportation expenses would not have been incurred but for the advice of his physician.

We have adequately discussed above the relationship of petitioner's living during the winter months in Florida and his use of an anticoagulant drug with its hoped for mitigation of the effects of his prior heart attacks and the prevention of further such incidents. It is undisputed that since the beginning of such treatment he has experienced no further attacks. We find the treatment was designed to and did accomplish those ends.

Although respondent argues that the treatment here was not sufficiently proximate to the onset or recurrence

of the disease from which petitioner suffers as to bear a relationship thereto, we think that argument falls of its own weight when it is considered that petitioner has, since sometime prior to his first attack, *always* suffered from atherosclerosis. Since the disease is not so symtomatic as to be brought to the awareness of an otherwise well layman, petitioner could not reasonably have known of its existence in his body prior to his first heart attack and, since he has suffered from it at least since the first attack, there have been no recurrences. Under the instant facts we do not think this is an apt test of the deductibility of the expenses here involved.

Although we find that petitioner's individual living and traveling expenses while in Fort Lauderdale during the years at issue were properly deductible medical expenses under section 213 of the 1954 Code, the petitioner seeks deduction of the rentals paid for an apartment wherein not only he but his wife and child were housed. That [fol. 11] portion thereof which represents the cost of housing his wife and child are nondeductible personal living expenses which we find must be eliminated from the total rentals paid. Inasmuch as petitioner seeks to deduct only his individual traveling expense, it appears to be inconsistent that he seeks to deduct the total rentals. The record indicates that the cost of a hotel room for petitioner alone during his stays in Florida during the years at issue would have exceeded the total rentals for the apartment in which he and his family lived, but it does not show the rental for his single occupancy of the apartment or other reasonably suitable living accommodations nor is it argued or shown that in the absence of his family petitioner would have necessarily occupied a hotel room. From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease. Under *Cohan* v. *Commissioner*, 39 F. 2d 540, we find that the proportion of the rentals deductible as the individual medical expense of petitioner was $500 for 1954 and $277 for 1955.

Decision will be entered under Rule 50.

BEFORE THE
TAX COURT OF THE UNITED STATES

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DECISION—Entered Dec. 29, 1959

Pursuant to the Court's findings of fact and opinion, filed October 26, 1959, directing that decision be entered under Rule 50, the respondent filed a computation on [fol. 12] December 7, 1959, which the petitioners agree is in accordance with the opinion: Therefore, it is

Ordered and decided, That there are deficiencies in income tax for the taxable years 1954 and 1955 in the amounts of $300.00 and $187.62, respectively.

Entered December 29, 1959.

(Signed) G. G. WITHEY,
Judge.

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[fol. 13]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,293

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT M. and SALLY L. BILDER

No. 13,294

ROBERT M. and SALLY L. BILDER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

On Petitions for Review of the Decision of the Tax Court of the United States

Argued October 20, 1960

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT—Filed April 7, 1961

By KALODNER, *Circuit Judge*

Are rental payments for an apartment during a winter's stay in Florida, incurred, as the Tax Court of the United [fol. 14] States found, "as a medical necessity and as a primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering", deductible as a "medical expense" under Section 213 of the Internal Revenue Code of 1954?

That is the primary question presented by the Commissioner of Internal Revenue's petition for review (No. 13,293) of the Decision of the Tax Court of the United States [1] which answered it in the affirmative.

[1] The decision of the Tax Court is reported at 33 T.C. (1960).

The issue is novel in the sense that it has never been decided by the appellate courts of the United States. It must immediately be noted that the Commissioner concedes that under the "medical expense" provisions of Section 23(x) of the Internal Revenue Code of 1939, as added in 1942, predecessor to Section 213 of the 1954 Code, the rental payments at issue were allowable deductions. As will subsequently be developed, the Commissioner contends that the effect of the 1939 Code provisions was changed by the addition of Section 213(e)(1)(B) so as to narrow "the scope of the medical deduction so as to allow only transportation expenses for travel prescribed for health", and to preclude rental expenses.

The petition for review (No. 13,294) of Robert M. Bilder ("taxpayer")[2] presents a secondary issue as to whether the Tax Court correctly limited his rental deduction, as will subsequently appear.

The critical facts as found by the Tax Court and not here disputed may be summarized as follows:

In 1954 taxpayer was engaged in the practice of law in Newark, New Jersey. He resided in a nearby town with his wife and three-year old daughter. He was then 43 years old. He had earlier suffered four coronary occlusions resulting in myocardial infarctions which restricted the flow of blood to his heart. The occlusions were suffered in the course of the disease of atherosclerosis which afflicted taxpayer.

[fol. 15] "One of the most eminent heart specialists in the United States if not the world" advised taxpayer in December 1953 that he spend the winter months in a warm climate as part of the treatment of his disease and in order to prevent further heart attacks.[3] Taxpayer, his

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[2] Mr. Bilder's wife, Sally, is also a petitioner here, but solely because she filed a joint return with her husband.

[3] On the score of the medical advice given to taxpayer to winter in Florida the Tax Court made these factual findings:

"This advice was given him because of his personality characteristics. He is and was at the time the advice was given a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or a hospital in the relatively cold

wife and infant daughter went to Fort Lauderdale, Florida which afforded the warm climate advised by his heart specialist. He rented an apartment there between January 1, 1954 and March 24, 1954 at a rental of $1500.00, which was less than the cost of a single room in a hotel. The apartment was in close proximity to a Fort Lauderdale hospital which had facilities to test taxpayer's blood to determine the correct dosage of an anticoagulant drug known as Dicumerol. One of the few doctors in Florida competent to supervise taxpayer's use of Dicumerol—then in limited use—practiced in Fort Lauderdale and taxpayer was under his care.

Taxpayer also rented an apartment in Fort Lauderdale from December 15, 1954 to February 10, 1955 at a rental for the period of $829.00. His wife and daughter accompanied him.

Taxpayer in his 1954 and 1955 income tax returns deducted as "medical care" expenses the respective Florida apartment rentals and $250.00 each year for transportation between Newark, New Jersey and Fort Lauderdale. The Commissioner disallowed the stated deductions and taxpayer resorted to the Tax Court which allowed the [fol. 16] deductions claimed for transportation but only one-third of the apartment rentals, because of its view that "From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease."

Following the filing of the Tax Court's Findings of Fact and Opinion on October 26, 1959, taxpayer moved

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climate of New Jersey through the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was for petitioner in order that new vascular passages for blood to the heart may more readily and quickly develop. . . .

". . . *The primary objective of all his treatment and the advice given incidental thereto was the prevention of further myocardial infarction with resulting impairment or destruction of the functioning of his heart, thus prolonging his life. . . .*" (emphasis supplied). 33 T.C. at .

for leave to submit additional testimony on the score of the "medical necessity" of having his wife share his apartment with him in Florida, and appended thereto an affidavit of his medical expert to that effect. The Tax Court denied taxpayer's motion on November 6, 1959 and subsequently, on December 29, 1959 filed its Decision.

Taking first the issue presented by the Commissioner's petition for review as to whether rental payments of the nature here involved are allowable deductions as a "medical expense" under Section 213 of the Internal Revenue Code of 1954:

It may be noted, preliminarily, that the Commissioner does not challenge the Tax Court's factual finding that it was necessary for the "medical care" of taxpayer that he winter in Florida. Nor does the Commissioner dispute that under Section 23(x) of the 1939 Revenue Code "non-hospital meals and lodging, incurred primarily for and essential to medical care" were allowable as "expenses of medical care".

The crux of the Commissioner's position, as he puts it, "is essentially that . . . lodging expenses are nondeductible personal living expenses, and that Section 213 of the 1954 Code . . . by expressly authorizing a deduction for transportation expenses, necessary to medical care, excludes allowance for lodging or meals." Section 23(x) of the 1939 Code, it may be noted, did not make specific provision for the deduction of transportation expenses but they were allowed by judicial construction of Section 23(x), with the acquiescence of the Commissioner.

The provisions of Section 23(x) of the 1939 and Section 213 of the 1954 Code, other than with respect to the [fol. 17] deductibility of transportation expenses, are identical. To afford a ready comparison they are set forth in adjacent columns as follows:

1939 Code

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

* * * *

"(x) Medical, dental, etc., expenses. Expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse or a dependent. . . .

* * * *

"The term 'medical care,' as used in this subsection shall include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance). . . ."

1954 Code

"§ 213. Medical, dental, etc., expenses

"(a) Allowance of deduction. —There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent. . . .

* * * *

"(e) Definitions. — For purposes of this section

(1) The term 'medical care' means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

The Commissioner's contention is that "the express proviso [subparagraph (B)] allowing only transportation costs *suggests* that Congress intended to limit the deduction for expenses of travel to exclude the costs of meals or lodging as allowable expenses includible in 'medical care'." (emphasis supplied).

In apparent recognition that he is leaning on the most slender of reeds in this respect, the Commissioner further resorts to the House and Senate committee reports which [fol. 18] state that subparagraph (B) "clarifies existing law in that it specifically excludes the deduction of any meals or lodging while away from home receiving medical treatment." It may be added that Treasury Regulations

on Income Taxes (1954 Code), Section 1.213-1(e)(1)(iv) so provide:[4]

At this juncture it should be stated that the Tax Court in the instant case refused to consider the House and Senate reports stating:

> "In view of the clarity of the working of section 213 of the 1954 Code, we see no reason to resort to congressional history for its meaning."

To the foregoing must be added that the Tax Court in Carasso v. Commissioner, 34 T.C. (1960), reviewed by the Court, with one judge concurring in the result and two dissenting, "disapproved" of its failure to examine legislative history in the instant case. The Tax Court, however, did not disapprove or repudiate the allowance of transportation and partial apartment rental made here, indicating that it construed the legislative history to permit allowance of living expenses in proper cases. That indication is buttressed by the fact that in disallowing living expenses in *Carasso* to a taxpayer who, on his doctor's advice, following two operations in which the major portion of his stomach was removed, took a [fol. 19] nine-day trip to Bermuda for convalescence, the

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[4] The Treasury Regulations read in relevant part as follows:

"(iv) Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for 'transportation primarily for and essential to medical care' shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for purely personal consideration to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deducible."

Tax Court expressly stated "*We express no opinion as to whether meals and lodging expenses might be deductible in other circumstances.*" (emphasis supplied.)

The sum of taxpayer's view is that Section 213(e)(1)(A) defines "medical care" in the same terms as Section 23(x) and since the latter permitted deductions for lodging expenses (apartment rental here), Congress, by reenacting its language into Section 213(e)(1)(A), provided for the continuance of such deductions; further, had Congress intended to make lodging expenses (and meals) nondeductible in the 1954 Code it could have so specified in Section 213, and finally, the congressional committee reports "contain ambiguities and, if literally applied, produce absurd results."

This summation of the views of the parties may appropriately be made at this juncture:

Both agree, as earlier stated, that Section 23(x) of the 1939 Code permitted allowance of rental payments as "medical care" in proper cases.[5] Further, both agree that Section 213(e)(1)(A) of the 1954 Code defines "medical care" in the same terms as Section 23(x) of the 1939 Code. The Commissioner, however, is of the view that "on its face" the additional definition of transportation costs as "medical care" in subparagraph (B) of Section 213(e)(1) "suggests" a statutory exclusion of lodging and meal[6] expenses incurred while receiving "medical care" away from home (except where paid as a hospital bill). He further urges that the House and Senate committee re- [fol. 20] ports relating to subparagraph (B)[7] "expressly"

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[5] Edward A. Havey, 12 T.C. 409 (1949); L. Keever Stringham, 12 T.C. 580 (1949), reviewed by the Tax Court, acq. 1950-2 Cum. Bull. 4, aff'd 183 F.2d 579 (6th Cir. 1950); Embry's Estate v. Gray, 143 F. Supp. 603 (W.D. Ky. 1956), appeal dismissed on motion of appellant-District Director of Internal Revenue, 244 F.2d 718 (6 Cir. 1957).

[6] The question as to allowability of deductions for meals is not here in issue since taxpayer made no claim with respect to them.

[7] In both the House and Senate Reports on the 1954 Code, the following appears (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 30,A60 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4197):

state that it makes such an exclusion, and that the impact of the legislative history requires us to construe (B) to effect such a result.

We need not be detained by the Commissioner's view that subparagraph (B) "on its face" "suggests" the limitation which he urges, or a congressional intent to effect it. Indeed "on its face", subparagraph (B), by its explicit terms, extends the deduction allowances for "medical expenses" to include "transportation primarily for and essential to medical care referred to in subparagraph (A)."

S. Rep. 1622, 83d Cong., 2d Sess., pp. 35, 219-220 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4856)):

> "Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill."

The Senate Report, *supra* (S. Rep. 1622, p. 35 3 U.S.C. Cong. & Adm. News (1954) 4666) recommending enactment of the language added in the governing statute also explained:

> "A new definition of 'medical expenses' is provided which allows the deduction of *only transportation expenses for travel prescribed for health, and not the ordinary living expenses incurred during such a trip.*" (Commissioner's emphasis).

That brings us to the Commissioner's contention that the legislative history of subparagraph (B) requires a judicial construction that it effects the limitation which he urges.

Since in our view there is nothing in the terms of (B) which effects the limitation urged, the sum total of the Commissioner's position is that what is dispositive of the [fol. 21] issue is not what the statute provides but what the legislative history says; otherwise stated, a statute can be nullified to the extent of repeal by its legislative history.

The Commissioner has not cited to us any precedent for his concept on this score nor has an exhaustive research on our part disclosed any judicial support for it.

The Supreme Court has time and again had occasion to consider vexing problems involving statutory construction. Earlier decisions indicated that where the terms of a statute are clear and unambiguous there is no requirement to consider legislative history in their construction, giving rise to what has been called the "plain-meaning rule."[8] That "rule" however has given way in recent years to the present teaching that legislative history will be examined by the courts ". . . to see whether that [it] raises such doubts that the search for meaning should not be limited to the statute itself." Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444 (1955).[9] In Alaska v. American Can

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[8] United States v. Hartwell, 6 Wall, 385, 396 (1868) where it was said: "If the language [of the statute] be clear it is conclusive. There can be no construction where there is nothing to construe. . . ." To the same effect see United States v. Shreveport Grain & El. Co., 287 U.S. 77, 83 (1932) where it was said: "In proper cases, such reports [legislative] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful."

[9] In Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) it was said: "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination".' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-44. See also *United States* v. *Dickerson*, 310 U.S. 554, 562."

Co., 358 U.S. 224, 226-27 (1959) it was said that courts will take "judicial notice" of legislative history.

We come now to consideration of the legislative history of subparagraph (B) and its asserted impact on (B) and the related provisions of Section 213.

Applicable to such consideration are these well-settled principles of statutory construction.

"Like other extrinsic aids to construction their [legislative history] use is to '*solve*, but not to *create* an ambiguity'", United States v. Shreveport Grain & El. Co., 287 U.S. 77, 83 (1932).

[fol. 22] Legislative history of a statute may not be taken as giving to it "a meaning not fairly within its words", St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 661 (1915); nor add new terms to it, United States v. Shreveport Grain & El. Co., *supra*.

"In expounding a statute, we must . . . look to the provisions of the whole law, *and to its object and policy*," United States v. The Heirs of Boisdoré, 8 Howard 113, 122 (1850); a construction "*that would produce incongruous results*" is to be avoided, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956). (emphasis supplied).[10]

"The long and well-settled construction" of an act, plus its reenactment without change of "the established construction", are "most persuasive indications" that the judicial construction "has become part of the warp and woof of the legislation", Francis v. Southern Pacific Co., 333 U.S. 445, 450 (1948).

Construction of statutes, which would make them a "dead letter" are not favored, Gemsco, Inc. v. Walling, 324 U.S. 244, 255 (1945); nor are repeals by implication, FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946).

"[L]iberalizations of the law in the taxpayer's favor . . . begotten from motives of public policy, . . . are not to be narrowly construed", Helvering v. Bliss, 293 U.S. 144, 151 (1934).

Remedial statutes should be construed in favor of those intended to be benefited, Helvering v. Bliss, *supra*; Hollander v. United States, 248 F.2d 247, 251 (2 Cir. 1957).

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[10] Cited with approval and applied in NLRB v. Red Lion Oil Co., 352 U.S. 282, 288 (1957).

Prefacing application of the principles stated we will direct our attention to the public policy evidenced in the enactment of the initial legislation making provision for deduction of "medical care" expenses.

Section 23(x) of the 1939 Code was added to that Code by Section 127(a) of the Revenue Act of 1942.

[fol. 23] The Senate Finance Committee Report (S.Rep. No. 1631, 77th Cong. 2d Sess.) outlined the purpose of Section 23(x) as follows at page 6:

> "This allowance is recommended in consideration of the heavy tax burden that must be born by individuals during the existing emergency *and of the desirability of maintaining the present high level of public health and morale*";

and at pages 95-96:

> "The term 'medical care' is *broadly* defined to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness." (emphasis supplied).

The Tax Court and the United States district courts and courts of appeals, as earlier stated, construed Section 23(x) to permit deductions of transportation, lodging and meal costs as "medical expenses" in proper cases, and the Commissioner, in Treasury Regulations 111, Sec. 29.23(x)-1, accorded with these decisions.

Moreover, in Revenue Ruling 55-261, 1955-1 Cum. Bull. 307, the Commissioner expressly recognized the deductibility under Section 23(x) of costs of travel, meals and lodging incurred primarily for and essential to "medical care".

The foregoing establishes that the entire legislative concept of "medical care" allowances as provided by the amended 1939 Code was based on a broad public policy—"the desirability of maintaining the present high level

of public health and morale", and that the courts and the Commissioner gave vitality to the public policy.

[fol. 24] That the public policy stated prevailed when the 1954 Code [11] was under consideration is evidenced by the fact that it doubled the ceiling of deductible "medical expenses" to $2,500 per person and $10,000 per family and reduced the prevailing deduction for expenses only in excess of five percent of gross income to three percent of gross income.

It is significant that the Undersecretary of the Treasury (Marion B. Folsom), when he appeared before the Senate Committee on Finance at a hearing to consider the 1954 Code "medical expense" provisions, submitted a document in which he called attention to the changes above mentioned and stated as to them and subparagraph (B) as follows:

> "Overall effect of proposed changes is to *liberalize and extend relief in real hardship situations due to heavy medical expense but curb deductions* of ordinary or luxury living expenses *in guise of medical costs.*" (emphasis supplied).

The document set forth clearly demonstrates that the draftsman and sponsor (the Treasury Department) of subparagraph (B) conceived its design, intent, and content to effect a limitation only of allowance "of ordinary or luxury living expenses *in guise of medical costs*" (emphasis supplied). Nothing was said in the document which would warrant its interpretation of subparagraph (B) as precluding allowance of living expenses incurred, as the Tax Court found they were in the instant case,

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[11] The public policy with respect to deductibility of "medical expenses" has been expanded in sweep by amendments to the 1954 Code since its enactment. In 1958, subsection (g) was added to Section 213. It increased from $2,500 to $15,000 the maximum allowance for "medical expenses" where taxpayer has attained the age of 65 and is disabled, and made similar provision with respect to his disabled spouse of the same age. In 1960, subsection (a) of Section 213 was amended to permit, within established limitations, "medical expenses" of dependent parents, who had attained the age of 65, of either or both taxpayers, without application of the excess of 3 percent of gross income proviso.

"as a medical necessity and as a primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering."

[fol. 25] It is a fair assumption that the congressional committees acted on the premise asserted by the Treasury Department in sponsoring subparagraph (B) although in their reports they failed to advert to that premise, namely, "curb" deductions "in guise of medical costs", and instead used sweeping terms which encompassed living expenses while away from home even though they were incurred "as a medical necessity and as a part of necessary medical treatment."

The committee reports are ambiguous when they state that "The deduction permitted for 'transportation primarily for and essential to medical care' *clarifies existing law* in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment", in view of the fact that the courts and the Commissioner had concurred in the construction of "existing law" (Section 23(x)) as permitting allowance of such expenses. (emphasis supplied). The ambiguity is emphasized by the fact that Congress in enacting the "medical care" provisions of the 1954 Code (Section 213(e)(1)(A)) used language identical with that in the "medical care" provisions of the 1939 Code (Section 23(x)), and it must be assumed to have had knowledge of the unanimous judicial and administrative construction of Section 23(x).

Where there is unanimity in the construction of the terms of a statute it is an anomaly to say that it requires clarification.

The Senate committee report can scarcely be said to be helpful in construing subparagraph (B) to which it relates. It makes this statement with reference to subparagraph (B):

> "A *new* definition of 'medical expenses' is provided which allows the deduciton of only transportation expenses for travel prescribed for health, and not the *ordinary living expenses* incurred during such a trip." (emphasis supplied).

[fol. 26] A reading of subparagraph (B) fails to disclose the slightest basis for the committee report state-

ment that it provides "a new definition of 'medical expenses'" which precludes allowance of "ordinary living expenses" in travel prescribed for health.

Subparagraph (B) merely adds, in the conjunctive, to the category of "medical care" defined in subparagraph (A), "amounts paid"—

> "for transportation primarily for and essential to medical care referred to in subparagraph (A)".

What was said in the Senate committee report concerning "ordinary living expenses" makes for confusion and not for clarification.

"Ordinary living expenses" have never been regarded as deductible medical expenses. The 1939 Code was construed by the courts to permit deduction only of those living costs which could be identified as "extraordinary" because they were incurred as "a medical necessity and as a primary part of necessary medical treatment." The case books abound with instances, decided under the 1939 Code, where living expenses were not allowed where the travel was not a part of "medical care", and were recognized to be "in guise of" such care.

Treasury Regulations 29.23(x)-1 relating to Section 23(x), consistent with judicial construction, provided in applicable part as follows:

> "Allowable deductions under section 23(x) will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for . . . *travel primarily for and essential to the rendition of the medical services or to the prevention or alleviation of a physical or mental defect or illness, are deductible.*" (emphasis supplied).

It should be stressed that subparagraph (A) of Section 213(e)(1) is the counterpart of the 1939 Code provi- [fol. 27] sions under which living expenses were allowed when they were part of "medical care." The legislative history of Section 213 makes no reference to subparagraph (A) nor has the Commissioner made reference here to that subparagraph despite the fact that subscription to

his view of the impact of the legislative history would operate to nullify it as far as travel allowance (other than transportation expense) is concerned.

The Commissioner's insistence that we are required to give a literal interpretation to the phrase "ordinary living expenses" in the legislative committee reports run counter to interpretations which he has made of this phrase in the Treasury Regulations relating to Section 213.

For example, a literal interpretation of the committee reports would require disallowance of the "cost of food and lodging" except when paid "*as part of a hospital bill*". (emphasis supplied).

Treasury Regulations 1.213-1(e)(v), however, provide that allowance may be made for meals and lodging "in an institution other than a hospital", such as "a special school for a mentally or physically handicapped individual", or a "home for the aged" where "medical or nursing attention" is accorded.

"The extent to which expenses for care in an institution other than a hospital shall constitute medical care", says the Regulations cited, "is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)".

The foreseeable circumstances that at a given time and a given place overcrowding in hospitals or institutions would preclude use of their facilities and necessitate non-hospital and non-institutional shelter and meals in a private home, hotel or apartment, does not seem to have been considered by the Commissioner. Nor has he given consideration to the fact, of which judicial notice may be taken, that hospital and institutional costs are so high as to be prohibitive to a large percentage of those in need of "medical care".

[fol. 28] In considering institutional care "other than a hospital" the Regulations enunciate the criteria that "The extent to which expenses for care . . . shall constitute medical care is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)". That criteria was emphasized by the Courts,

and the Commissioner, in applying Section 23(x), and if the Commissioner's construction of the impact of the legislative history on the 1954 Code provisions permits his inclusion of non-hospital care, providing it is institutional in nature, such history cannot logically be said to bar its application in private facility cases, such as the apartment involved in the instant case.

On this score it must be noted that the Tax Court in the instant case made this specific factual finding:

> "Their sojourns [taxpayer and his wife] in Fort Lauderdale during the years at issue were not vacations; *they were taken as a medical necessity and as a primary part of necessary medical treatment of a disease* from which petitioner [taxpayer] was and still is suffering." (emphasis supplied).[12]

This factual finding is not disputed by the Commissioner.

It may be interposed that the Commissioner's position here is inconsistent. He has formally acquiesced in this case to the Tax Court's holding that taxpayer's transportation expenses are deductible[13] and indicated non-acquiescence with its ruling making partial allowance of apartment rental.[14] It is true that he premises his position on legislative history but realistically if it was necessary for taxpayer to go to Florida as "medical care" it was equally necessary as part of that "medical care" that he receive shelter while he was there.

[fol. 29] The Commissioner's position calls to mind the old nursery rhyme:

> Mother, may I go out to swim?
> Yes, my darling daughter:
> Hang your clothes on a hickory limb
> But don't go near the water.

What has been said brings us to the application here of the earlier stated principles of statutory construction.

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[12] 33 T.C. at

[13] 1960 Int. Rev. Bull. No. 16, at 9.

[14] 1960 Int. Rev. Bull. No. 33, at 7.

To begin with, the impact of legislative materials must be evaluated in the light of the whole legislative scheme, the purpose sought to be achieved and the particular statutory provisions under scrutiny.

As was said in Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) where legislative history was considered,

> "[T]he fair interpretation of a statute is often 'the art of proliferating a purpose', . . . revealed more by the demonstrable forces that produced it than by its precise phrasing."

In Ozwa v. United States, 260 U.S. 178, 194 (1922) the Supreme Court pointed out that in construing the express terms of a statute, *if* "by giving the words their natural significance . . . this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, *sacrificing, if necessary, the literal meaning in order that the purpose may not fail.*" (emphasis supplied).

It follows, of course, if in the construction of the express terms of a statute we must "give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail", that language used in legislative history [fol. 30] must be subjected to a similar test, and its "lateral meaning" sacrificed "in order that the purpose" of the legislation "may not fail".

In the instant case, as has already been pointed out, the "medical expense" provisions of the 1954 Code evidence a broad public policy to maintain "the present high level of public health and morale" and the statute is clearly remedial in nature.[15] Such a statute, effecting "liberalizations of the law in the taxpayer's favor . . . begotten from motives of public policy . . ." is not only

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[15] Hollander v. Commissioner, 219 F.2d 934 (3 Cir. 1955).

"not to be narrowly construed" but is to be broadly construed in the taxpayer's favor.[16]

Assuming, arguendo, that the "literal meaning" of the legislative history here is what the Commissioner says it is, that "meaning" must be "sacrificed", under the Supreme Court's teaching, in order that "the policy" of Section 213 may not be frustrated and that its "purpose may not fail."

Moreover, since the Commissioner's view of the effect of the legislative history, if subscribed to, would require a construction which would make it "a dead letter", it is not to be "favored".[17]

Again, the substance of the Commissioner's contention that the legislative history adds "new terms to the statute" must be rejected under the settled rule that legislative history of a statute may not be taken as giving it "a meaning not fairly within its words"[18] nor add new terms to it.[19]

In our view the most that can be said of the legislative history here is that it creates an ambiguity with respect to the statutory provisions and that being so it cannot be availed of under the teaching that the use of legislative history is to "*solve*, but not to *create* any ambiguity."[20] [fol. 31] The least that can be said of the legislative history is that if it has the impact on Section 213 urged by the Commissioner it would effect a construction of the statute that "would produce incongruous results" and that, we have been told, is to be avoided.[21]

Under the holding in Francis v. Southern Pacific Co., *supra*, since Section 213 (a),(e)(1)(A) of the 1954 Code is a re-enactment of Section 23(x) of the 1939 Code, and the courts (and the Commissioner) over a twelve year

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[16] Helvering v. Bliss, 293 U.S. 144, 151 (1934).

[17] Gemsco, Inc. v. Walling, 324 U.S. 244, 255 (1945).

[18] St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 661 (1915).

[19] United States v. Shreveport Grain & El. Co., 287 U.S. 77, 83 (1932).

[20] Ibid.

[21] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956).

period had construed Section 23(x) to permit allowance of lodging and meals as "medical expenses" where they were incurred as "medical care", "the long and well-settled construction" of Section 23(x), plus its re-enactment without change of "the established construction" provide "most persuasive indications" that the judicial construction "has become part of the warp and woof" of Section 213.

What the Commissioner is really urging here is the repeal "by implication", by the legislative history, of subparagraph (A) of Section 213 to the extent that it, as the counterpart of Section 23(x), permitted allowance of lodging and meals as "medical expenses" in proper cases. The ready answer is that repeals by implication are not favored,[22] and the applicable rule is that "where a general policy of government has been well established by statutes and recognized in court decisions, 'a clear expression of the intention of Congress' is required to justify a reversal. Ex parte Crow Dog, 1883, 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030."[23]

We have already expressed the view that the legislative history here is ambiguous and that on that score what was said in FCC v. Columbia Broadcasting System, 311 U.S. 132 (1940) seems particularly appropriate.
[fol. 32] It was there stated (pp. 136-37):

> "What was said in Committee Reports, and some remarks by the proponent of the measure in the Senate, are sufficiently ambiguous . . . to invite mutually destructive dialectic, but not strong enough either to strengthen or weaken the force of what Congress has enacted."[24]

With reference to the Senate and House committee reports here, viewing them in the most favorable light "we cannot say that the legislative history . . . is so

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[22] FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946).

[23] Commissioner v. Fivera's Estate, 214 F.2d 60, 62-63 (2 Cir. 1954). To the same effect see Fawcett v. Comissioner, 149 F.2d 433, 435 (2 Cir. 1945).

[24] Witness the divergent views on the score of the legislative history of Section 213 in Carasso v. Commissioner, 34 T.C. (1960).

persuasive . . ."[23] as to achieve the effect on the construction of Section 213 urged by the Commissioner.

Pertinent here is what was said in Acker v. Commissioner, 258 F.2d 568, 576 (6 Cir. 1958), aff'd 361 U.S. 87 (1959):

> "It seems to us a policy of first order that taxpayers under this 'government of laws and not of men' be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, *and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval.*" (emphasis supplied).

We are aware, of course, as the foregoing indicates, that the Court in *Acker* was concerned with the construction of a penalty statute and that such statutes are strictly construed against the government. However, we are here dealing with a remedial statute which under the applicable rule is to be construed in favor of the taxpayer, so that what was said in *Acker* is pertinent here. [fol. 33] On the score of the Commissioner's attempt here to effect judicial amendment of the "medical expenses" statute, what was said in Helvering v. Rebsamen Motors, Inc., 128 F.2d 584 (8 Cir. 1942) is likewise pertinent.

Said the Court in that case at page 588:

> "It seems to us, however, that neither the taxing authorities nor the courts are justified in virtually amending a taxing act because they are of the opinion that *Congress may have had* or should have had a different *intention* than that which was expressed in *the act.* There would seem to be nothing unreasonable in a rule of construction which requires legislative bodies, in enacting taxing statutes, to use language of sufficient clarity to be understood by an ordinarily intelligent taxpayer as well as by those

[23] Commissioner v. Acker, 361 U.S. 87, 93 (1959).

who are required to administer and to interpret the statutes." (emphasis supplied).

We can find no better way to conclude our discussion of the Commissioner's petition for review than to quote what was said by Chief Justice Taney more than a century ago in United States v. The Heirs of Boisdore, *supra* at 122, on the score of statutory construction:

> "In expounding a statute, we must . . . *look to the provisions of the whole law, and to its object and policy.*" (emphasis supplied).

Looking "to the provisions of the whole law, and to its object and policy" here we cannot give to the construction of the "medical expense" statute a meaning that would preclude allowance of lodging and meals incurred in the course of travel "as a medical necessity and as a primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering", as the Tax Court factually determined in the instant case.

[fol. 34] If Congress had wanted to effect the limitation urged by the Commissioner "it would have been easy to have said so in express terms; and because it did not do so, we are led irresistibly to the conclusion that it did not intend . . ." to do so. Tillson v. United States, 100 U.S. 43, 46 (1879).

There remains for disposition taxpayer's petition for review of the Tax Court's limited allowance of his Florida apartment rentals.

It will be recalled that the Tax Court allowed taxpayer a deduction of only one-third of his rentals because of its view that "From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease." The Tax Court, as earlier stated, denied taxpayer's motion for leave to submit additional testimony on the scope of the "medical necessity" of having his wife share his apartment with him. The motion was made subsequent to the filing of the Tax Court's Findings of Fact and Opinion but prior to the rendition of its Decision. It was accom-

panied by an affidavit of Dr. Irving S. Wright, taxpayer's heart specialist,[26] which stated in part:

> "I could not in good conscience have sent Mr. Bilder, or any patient who had a comparable history of multiple myocardial infarctions to Florida by himself for a period of months without his wife or a nurse to stay with him. I would most certainly have testified to this effect without qualification had the question been raised during my testimony."

It must here be noted that in the Tax Court the Commissioner, as evidenced by his brief, premised his contention of non-deductibility of the expenditure for rent on his view that "An expenditure for rent is not within the term medical care as defined in the 1954 Code and cannot [fol. 35] be deducted as a medical expense", and his disallowance of taxpayer's transportation costs to Florida, on the ground that it was not "primarily for and essential to medical care."

In connection with the foregoing it must also be said that at the trial in the Tax Court, the Commissioner's theory of his case was that taxpayer's travels to Florida and his stays there were not "for the treatment, prevention, alleviation or cure of any disease" and accordingly did not constitute "medical care". It may also be pointed out, in view of the Commissioner's position here (1) in not challenging the Tax Court's finding that taxpayer's travels to Florida were necessary as "medical care"; (2) in acquiescing in the allowance of taxpayer's transportation expenses to Florida as "medical care"; and (3) in confining his contention here to the non-allowability of rental deductions under the 1954 Code, the Commissioner, nevertheless in the Tax Court, via his counsel, stated that ". . . it would be inconsistent to allow him the transportation to Florida and not to allow him the rent, our position being that these trips to Florida were not necessary at all."

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[26] In its Opinion the Tax Court described Dr. Wright as "one of the most eminent heart specialists in the United States, if not the world." The record discloses that he is a former president of the American Heart Association.

The statement referred to gives emphasis to our earlier characterization of the Commissioner's position as "inconsistent."

Be that as it may, the record discloses that attention was not specifically directed in the Tax Court to the issue of percentage allocations of taxpayer's rental payments in Florida. The Commissioner, indeed, states in his Reply Brief here "that, if this Court should hold that any part of the lodging expense is deductible, the case should be remanded to the Tax Court to permit the taxpayer to present evidence that it was medically necessary for taxpayer's wife to accompany her husband to Florida during the periods involved and that she would not otherwise have done so."

In making this statement, the Commissioner, however, asserts that in any event "one-third of the rent allocated to the child's occupancy of the Florida apartment would [fol. 36] not be deductible and the taxpayer does not contend that it was medically necessary for the child to be with her father in Florida."

On review of the record we see no compelling reason to remand to the Tax Court for a determination of the issue of the extent of the rental allocations.

We are of the opinion that the record as already made, affords sufficient basis for a fact-finding that it was a necessary part of the "medical care" of taxpayer that his wife and child should accompany him to Florida, and that in the interest of expeditious disposition of this litigation, and in view of its over-all remedial aspects, we should make that finding now.

Taxpayer, according to the Stipulation of Facts in the record, suffered four heart attacks—the first in March, 1946 while he was serving as a Lieutenant Commander in the United States Navy; the second in March, 1951; the third in December, 1952 and the fourth in April 1953; Dr. Wright, because "it had been noted that practically all of his [taxpayer's] attacks had occurred during the winter months", recommended that he winter in Florida "as a medical necessity" and as a "highly important part of his therapy"; taxpayer was a "hyperkinetic individual—under a good deal of inward stress and tension."

The record, as stated, affords ample basis for a factual finding that it was necessary to taxpayer's "medical care" to have his wife accompany him to Florida, and stay with him there. We can take judicial notice of the fact that one who has had four heart attacks should not live alone, particularly when, as here, he is a "hyperkinetic individual".

We can take judicial notice, too, of the anxieties which would afflict a father, concerned with the well-being of his three-year old daughter, should they be separated by distances as great as that between Florida and New Jersey (the home of taxpayer), and that the obviation of such anxieties was an imperative necessity here to the "medical care" of taxpayer because of the damaging effect their [fol. 37] impact would have had on his mental and physical being, particularly in view of his "hyperkinetic" personality.

In making this finding we have taken into consideration the element that the presence of this three-year old child could have been of minimal consequence with respect to the amount of rental paid by taxpayer for his apartments. It is supported by the Tax Court's finding that "The record indicates that the cost of a hotel room for petitioner [taxpayer] alone during his stays in Florida during the years at issue would have exceeded the total rentals for the apartment in which he and his family lived . . ."

For the reasons stated the Decision of the Tax Court will be vacated and the cause remanded with directions to proceed in accordance with this opinion.

HASTIE, *Circuit Judge, dissenting.*

This decision is extraordinary in that the majority insist that a recent enactment of Congress means exactly the opposite of what the Senate and House Committee reports on the bill and such other statements as there are on the point in the legislative history say it means. In fact, both committee reports anticipate the exact

case which is before us and say explicitly that expenses for meals and lodgings are not deductible.

> "The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the [fol. 38] patient's transportation to Florida would be deductible but not his living expenses while there." H. REPT. No. 1137, 83d Cong. 2d Sess. at A60; S. REPT. No. 1622, 83d Cong. 2d Sess. at 219-220.

The House report is equally as explicit at another point:

> "A new definition of 'medical expenses' is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, but not the ordinary living expenses incurred during such a trip." H. REPT. No. 1337, *supra*, at 30. See also S. REPT. No. 1622, *supra*, at 35.

When the proposed new tax legislation was being considered in the Senate committee, the Undersecretary of the Treasury, Marion B. Folsom, advised the committee that the new definition of medical care was intended to "permit deduction of cost of transportation necessary for health but not ordinary living expenses incurred during trip". Hearings before Senate Finance Committee on H.R. 8300, 83d Cong. 2d Sess., part 1, p. 103. He added that this was one of the "principal [amendatory] provisions". In these circumstances, this is not a case in which the intention of Congress, as indicated by the legislative history, is in any way doubtful or ambiguous. It is plain that Congress was repeatedly advised by its responsible committees in charge of the legislation and by the execu-

tive department responsible for assisting in the presentation and explanation of tax legislation that the new definition of medical care was intended to preclude the deduction of living expenses during necessary absences from home for medical care.

If this plain intention of Congress is to be ignored, it must be because what Congress actually said in the statute is clearly contrary to what it meant. I think the majority recognize that this is their difficult task. I also think that analysis of the relevant legislation clearly shows that the language of the 1954 Code carries out the indi- [fol. 39] cated legislative purpose to preclude the deduction of living expenses and does not in any way contradict it.

The fundamental mistake of the majority, which persists throughout their analysis and, in my view, invalidates it, is that they wholly ignore one of the two controlling sections of the 1954 Code. Specifically, the majority do not take into account the language of Section 262 of the 1954 Code which replaces Section 24 (a)(1) of the 1939 Code. Section 24 (a)(1) had provided that "in computing net income no deduction shall in any case be allowed in respect of—(1) personal, living, or family expenses, except extraordinary medical expenses deductible under Section 23 (x). . . ." Section 262 of the 1954 Code substituted for the old Section 24 (a)(1) the following language: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." Thus, Section 262 eliminates the former special reference to extraordinary medical expenses and provides instead that no deduction of living expenses whatever shall be allowed unless "expressly provided in this chapter". This means that, when a taxpayer asserts that living expenses during absences from home necessary for medical care are deductible under the 1954 Code, he must carry the burden imposed by Section 262 of pointing out where such living expenses are "expressly" included among the deductible items related to medical care. This cannot be done here because there simply is no such express provision.

The basic authorization of medical deductions, as it appears in Section 213 (a), is stated in general terms:

> "(a) Allowance of deduction.—There shall be allowed as a deduction the expenses paid during the taxable year . . . for medical care of the taxpayer. . . ."

Obviously this language does not "expressly provide" for any deduction of living expenses. Indeed, pages of the majority opinion are devoted to a reasoned argument to [fol. 40] justify construing the general statutory reference to "expenses for medical care" as intended to include living expenses. To me such an argument only emphasizes the basic error. The very reason that elaboration is necessary is that Congress made no "express provision" for the deduction of living expenses.

Even if the decisive requirement of Section 262 were absent, I think Section 213 (e) indicates, as the Tax Court has recently held, that living expenses are not deductible. *Max Carasso*, 1960, 34 T.C. No. 119. I have already referred to the basic language of Section 213 (a) which in general terms allows a deduction for "expenses paid . . . for medical care. . . ." Standing alone this language could be interpreted in various ways. It might mean only the cost of medication, medical services and the like. It could be interpreted to include maintenance of the sick in hospitals, at home or elsewhere. It could include travel for medical care or travel for convalescence. The point here is simply that the language is not precise or specific as to the situations it covers. It requires interpretation. Accordingly, Congress added the interpretative Section 213 (e) which reads:

> "(e) Definitions.—For purposes of this section—
>
> (1) The term 'medical care' means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

This definition says nothing about living expenses. The majority characterize this omission as "a slender reed" upon which to lean. But it is those who take the position [fol. 41] that the statute authorizes a deduction of living expenses who require affirmative support for their position.

Section 213 (a) does not define expenses for medical care. Section 213 (e) purports to define the term and in so doing says nothing about living expenses. What the majority have to do is to construe the reference in Section 213 (e)(1)(A) to amounts paid for "diagnosis, cure, mitigation, treatment, or prevention of disease" as inferentially including living expenses on trips away from home which are necessitated by considerations of health. Of course it can sensibly be argued that such an inclusive interpretation should be given these words. There is precedent for that interpretation in the Tax Court's treatment of the general language of the 1939 Code. *L. Keever Stringham*, 1949, 12 T.C. 580, *aff'd per curiam*, 6th Cir. 1950, 183 F.2d 579. But, whether one agrees with that interpretation or not,[1] it is not obvious on the face of Section 213 of the 1954 Code. To the contrary, the separate specific provision of Section 213 (e)(1)(B) allowing a deduction of transportation expenses essential to medical care suggests that the immediately preceding language of Section 213 (e)(1)(A) is intended to include only those things which we conventionally describe as medical bills.

Since the face of the statute does not make either of the opposing constructions unreasonable, this is a case in which resort to legislative history is particularly appropriate. It has already been pointed out that the legislative history shows plainly that Congress did not intend to allow a deduction for living expenses.

In summary, I find the conclusion of the majority erroneous for two distinct reasons. First, Section 262

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[1] In the *Stringham* case itself three judges of the Tax Court dissented, believing that the general language of the 1939 Code did not cover living expenses. And the majority opinion in that case recognized that "this section is susceptible to a variety of conflicting interpretations" and necessitates an inquiry into legislative history and congressional intent. 12 T.C. at 583.

precludes the deduction of living expenses in the absence of any express provision therefor. There is no mention [fol. 42] of living expenses in the section which, in the view of the majority, permits such a deduction. Second, the conclusion of the majority is reached by giving Section 213 (a) a meaning that is not made obvious by a mere reading of that subsection and its definitional supplement, Section 213 (e). Therefore, it is proper to resort to legislative history which plainly shows that Congress intended that these provisions should preclude the deduction of living expenses. For these reasons, I think the decision of the Tax Court should be reversed and the deficiency determined without any deduction of living expenses.

• • • •

[fol. 43]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,293

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ROBERT M. and SALLY L. BILDER, RESPONDENTS

No. 13,294

ROBERT M. and SALLY L. BILDER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review a Decision of the Tax Court of the United States

Present: McLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

JUDGMENT—April 7, 1961

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby vacated, and the cause remanded with directions to proceed in accordance with the opinion of this Court.

Attest:
IDA O. CRESKOFF
Clerk

• • • •

[fol. 44]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,293

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ROBERT M. and SALLY L. BILDER, RESPONDENTS

No. 13,294

ROBERT M. and SALLY L. BILDER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Present: KALODNER and HASTIE, Circuit Judges.

ORDER OF SUBSTITUTION—Aug. 25, 1961

The Commissioner of Internal Revenue having suggested the death upon the record of Robert M. Bilder,

It is ORDERED that Sally M. Bilder, as sole executrix of the last will and testament of Robert M. Bilder, Deceased, be substituted in place of Robert M. Bilder, deceased, in the above cases; and that the captions of the above cases in this Court be amended as follows:

No. 13,293 Commissioner of Internal Revenue, Petitioner, vs. Sally L. Bilder, Individually, and and as Sole Executrix of the Last Will and Testament of Robert M. Bilder, Deceased

No. 13,294 Sally L. Bilder, Individually, and as Sole Executrix of the Last Will and Testament of Robert M. Bilder, Deceased, Petitioners, vs. Commissioner of Internal Revenue

KALODNER
Circuit Judge

August 25, 1961

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 46]

SUPREME COURT OF THE UNITED STATES
No. ———, October Term, 1961

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT M. BILDER, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

September 4, 1961.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 20 day of June, 1961.

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. 384, October Term, 1961

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SALLY L. BILDER, ETC.

ORDER ALLOWING CERTIORARI—November 13, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 622481 715